The Crack in Justice Scalia's Crystal Ball: Single-Sex Charter Schools May Prove His Prediction in VMI Was Wrong

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THE CRACK IN JUSTICE SCALIA'S CRYSTAL BALL:
SINGLE-SEX CHARTER SCHOOLS MAY PROVE HIS PREDICTION IN VMI WAS WRONG

In his dissent in United States v. Virginia, Justice Antonin Scalia lamented that the majority’s opinion would assure that no one would experiment with opening single-sex schools, stating, “it ensures that single-sex public education is functionally dead.” Justice Scalia was, at least for the present time, wrong. On August 22, 2000, the Young Women’s Leadership Charter School opened, becoming the only all-girls public school in Chicago and the fourth nationally. The school was modeled after a New York single-sex public school, the Young Women’s Leadership School of East Harlem, which opened in 1996 and has been praised for its success in improving its female students’ test scores.

Both charter schools and single-sex public education have been touted by proponents as critical to school reforms, and, at the same time, disparaged by critics on a number of grounds. A concern of the critics of single-sex schools is that they are discriminatory in their establishment and operations. The American Civil Liberties Union (ACLU) and National Organization for Women (NOW) filed a complaint with the U.S. Department of Education’s Office of Civil Rights (OCR) against the East Harlem school, alleging it violates the Equal Protection Clause of the Constitution. In 1997, the U.S.

2. Id. at 596 (Scalia, J., dissenting). Justice Scalia wrote:
   Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an ‘exceedingly persuasive justification’ for the classification.... No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won....
   Id. at 597.
3. See Lauren Cowen, A Class of Their Own; A Girls Charter School Leaves Boys out of the Equation, CHI. TRIB., Oct. 1, 2000, at C12. The other three schools are not charter schools.
4. See id.
5. See, e.g., Nancy Levit, Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation, 67 GEO. WASH. L. REV. 451, 453-54 (1999). Levit’s article contains an outstanding overview of major research in single-sex education over the last three decades, covering studies that conclude single-sex education results in measurable differences in performance and attitudes of children, and that determine single-sex education is an insignificant or detrimental factor to performance and attitudes of children.
7. See V. Dion Haynes, Boys and Girls in a Class Apart; Amid Evidence that Males and Females Learn Differently, More Educators are Embracing the Idea of Separate but Equal, CHIC. TRIB., Sept. 30, 1999, at N1. The Equal Protection Clause states that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
Department of Education “issued an informal preliminary finding that the school appeared to violate federal law. Two remedies were suggested: sexually integrate the school or establish a separate but equal school for boys.” The New York City school chancellor said he would exercise neither remedy.\(^9\)

A Michigan school district considered abandoning a single-sex education option for sixth-grade students after NOW filed a complaint with the Department of Education, arguing that the single-sex classes violated Title IX of the Education Amendment of 1972.\(^10\)

The Chicago chapter of the ACLU has not challenged the Young Women’s Leadership Charter School, but has indicated concern that gender should not limit students in Chicago public schools.\(^11\) The organizers of the Young Women’s Leadership Charter School created differences from previous gender-based admissions policies to help avoid legal challenges, such as not specifically excluding boys in its admissions policy and screening children only for age, academic standing, and city residency.\(^12\) School officials indicated that

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9. See id.

10. See Sara Gay Dammann, *Despite Success, Michigan School Told to End Same-Sex Classes*, CHI. TRIB., Sept. 30, 1999, at N17. Title IX states:

   No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: (1) Classes of educational institutions subject to prohibition, in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.

20 U.S.C. § 1681 (1994). This Note will not discuss Title IX applications to single-sex schools in depth. The U.S. Department of Education discusses the exemption of 20 U.S.C. § 1681(1) in a pamphlet about charter schools and civil rights laws:

   An exemption in Title IX permits Local Education Authorities to establish single-sex elementary or secondary schools as long as they are not vocational schools. However, when an LEA establishes a public school for one sex — unless it is necessary to remedy discrimination — any student excluded based on sex must have been made available comparable courses, services, and facilities, pursuant to the same policies and criteria of admissions.


11. See Cowen, *supra* note 3, quoting Ed Yohnka, director of communications for the Chicago ACLU chapter: “We continue to be concerned about the school because fundamentally we believe that a quality educational opportunity...should be made available to every student in the Chicago public school system and should not be limited by race, ethnicity, religion, or gender.” Yohnka mentions that the ACLU challenged Lane Tech High School thirty years ago for excluding girls, leading to the school becoming coeducational. *Id.*

“comparable opportunities do exist for boys elsewhere in the Chicago Public School system.”

If the ACLU, NOW, or another organization challenges the Young Women’s Leadership Charter School, the analysis would start with a determination of whether a charter school is a state actor, then proceed to an equal protection analysis. Prior case law generally proscribes gender discrimination in state-funded education.

This Note will analyze the equal protection strictures applied to single-sex charter schools. First, this Note will define and discuss features and characteristics of charter schools, and legislation enabling districts to form charter schools. Second, this Note will discuss the proponents' and detractors' arguments about single-sex education. The third part will address the state actor status of charter schools. Fourth, this Note will analyze significant case law regarding single-sex public education under the Equal Protection Clause. Finally, this Note will assert that charter schools indeed are state actors, and therefore must adhere to current statutes and case law that prohibit gender discrimination in violation of the Equal Protection Clause. Should a future plaintiff challenge the single-sex policy of a charter school on Equal Protection grounds, the school’s program will be analyzed in accordance with case law discussed in part four.

Charter schools offer a unique alternative form of elementary and secondary education to students who choose to attend them. While single-sex charter schools are not prevalent at this time, such a twist on the charter school alternative may appeal to some parents and children who believe students may benefit from single-sex schooling. Some research evidence shows that children fare better in single-sex classrooms, or that these single-sex alternatives provide a means of redress for past discrimination against members of a sex. This research evidence may provide the basis to defeat a future challenge by demonstrating an “exceedingly persuasive justification” for the segregation based upon sex. Comparable choices for boys and girls may be created in elementary, intermediate and secondary settings. Therefore, single-sex charter schools may be able to survive

13. See id.
15. See, e.g., Morgan, infra note 53 and accompanying text; Haynes, supra note 7; HOW SCHOOLS SHORTCHANGE GIRLS (Am. Ass'n of Univ. Women Educ. Found., 1992) (asserting the cause of girls' educational difficulties and low self-esteem was gender bias in schools).
because they benefit members of what was deemed, under some higher education analyses, a discriminatory classification based upon gender.

**CHARTER SCHOOLS**

*Charter Schools Defined*

“A charter school is a *public school of choice* which is authorized by *state statute* and which is established by and operates under the terms of a *charter* granted to *school organizers* by a *public sponsoring agency* to whom the school is thereafter *accountable.*” The charter, or contract, is usually with a state agency or local school board; creates a framework for the school’s operation; and provides public support for the school for the time specified in the charter. Organizers can be parents, teachers, school administrators, or others. “The school’s charter gives the school autonomy over its operation and frees the

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1. Teachers, parents, and other community members can create new schools or convert existing schools by authority of a charter granted by an authorized sponsor.

2. Charter schools are responsible for improved student achievement.

3. In return for accountability for specific results, the state grants an upfront waiver of virtually all rules and regulations governing public schools.

4. The state authorizes more than one organization to start and operate a charter school in the community.

5. The organizers, usually teachers, parents, or other community members, can approach either a local board or some other public body to be the school sponsor.

6. The charter school is a school of choice.

7. The charter school is a discrete legal entity.

8. The full per-pupil allocation should move with the student to the charter school.

9. Participating teachers should be given support to try new opportunities by having their status protected.


school from regulations that other public schools must follow." At the same time, charter schools "are free, open to all, and designed to be publicly accountable...." Accountability requires meeting the goals of the charter, which often include improving student performance. "Charter schools serve as choice schools rather than traditional neighborhood schools; typically, charter schools may enroll any student in the district, rather than being limited to students living in the school's immediate vicinity." Often, charter schools serve students who have not succeeded in conventional schools, such as students with special needs learning styles or children who have dropped out of school or had legal problems. Many charter schools serve minority and disadvantaged children.

A key element of charter schools is that they are, indeed, public. Charter schools are financed largely with tax dollars, assuring the schools public funding for operating as a public institution while "subject to all applicable federal laws and to those applicable state laws from which it has not been granted waivers." Each state determines its own charter school funding procedures, such as receiving a percentage of the school district's per pupil operating revenue or revenues from the school district based upon categorical programs. Start-up funding may come from a number of sources: businesses, charitable foundations, and the federal government, or funds allocated by state legislatures. Charter schools may also elect to have local school districts provide some services.

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24. Hassel, supra note 18, at 129; see also Nathan, supra note 18, at 133.
25. State of Charter Schools 2000, supra note 18, at 30. The study states the fear that charter schools would serve mostly white students has not materialized. Charter schools enrolled a larger percentage of students of color than the public schools in those states with an open charter school. Id. Charter schools were more likely to enroll African-American students and Hispanic students than all public schools. Id. Thirty-nine percent of all charter school students were eligible for free or reduced-price lunches, a common figure used to show economic disadvantage, while thirty-seven percent of all public school students were eligible. Id. at 34.
27. Id.
28. Id. at 53.
29. See id. at 92-95, 155-57; Nathan, supra note 18, at 176-77 (describing sources of start-up funding).
30. See generally Blakemore, supra note 17 (suggesting the need to decide which services school districts should provide, such as transportation, special education, insurance, and custodial services); see State of Charter Schools 2000, supra note 18, at 48-49 (providing statistics on sources of charter school services). School districts provide approximately
Charter schools are distinguishable from conventional public schools in the degree of autonomy they possess through the terms of the charter. Most charter schools have primary control over administrative functions such as budget and hiring; and control over operation of their educational programs, such as scheduling and curriculum, but only fifty-nine percent reported primary control over student admissions policies.

Though ultimately accountable to some public authority, charter schools in theory are governed by independent boards with a great deal of autonomy. Because their curriculums, teaching methods, and management practices affect only those who choose to attend, charter schools do not have to convince districtwide majorities that their approaches are right.

Charter schools have incentives to perform because their students are attending by choice, and the public authority granting a charter can revoke the charter for failure to meet standards. One aspect of accountability is “compliance with all applicable laws.” In some states, legislative provisions explicitly state that violation of law is a ground for revocation of the charter.

**Charter School Legislation**

The first charter school law was enacted in Minnesota in 1991, and by September 1999, thirty-six states and the District of Columbia had passed charter legislation. State laws vary, but most contain twenty-five percent of all services in all charter schools. Id. at 49.

31. See STATE OF CHARTER SCHOOLS 2000, supra note 18, at 48-49.

32. Id. at 46-48. “Charter schools are afforded flexibility to make independent decisions and set policy about both educational and management issues, though some school decisions may be constrained either by provisions of the state's charter legislation or by decisions and practices implemented by their charter granting agency.” Id. at 46.

33. HASSEL, supra note 18, at 3.

34. Id. at 79.

35. BLAKEMORE, supra note 17, at 5.

36. STATE LEGISLATIVE UPDATE, supra note 19, at 3.

37. Id. at 2.

38. STATE OF CHARTER SCHOOLS 2000, supra note 18, at 10. More than 1,400 charter schools were in operation as of September 1999. Id. Washington State had a charter school initiative on the ballot in November 2000. Education is Big on Ballots, TIME, Nov. 6, 2000, at 85. Voters defeated the referendum. Id. Linda Shaw, Charter schools apparently defeated, but battle goes on, SEATTLE TIMES, Nov. 9, 2000, available at http://archives.seattletimes .nwsource.com (last visited May 3, 2001).
rules governing establishment, accountability, funding, and exemption from state laws.  

"The most significant and controversial aspect of charter school legislation is the ability of charter school applicants to request a virtual blanket waiver from administrative regulations and local district rules but not from health, safety, dismissal or various civil rights regulations." Some charter school statutes specifically require that charter schools not discriminate on an illegal basis. At least one state, Mississippi, does not expressly prohibit sex segregation in its charter school statute, but allows segregation elsewhere in the education statutes. Other statutes exempt schools from routine operating regulations, but require they be run in accordance with state and federal civil rights laws. 

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39. See generally State Legislative Update, supra note 19. The update surveys new charter school legislation using eight categories as follows: charter-granting authority; types (newly created, or converted public or private schools); number of schools allowed; waivers of state laws; staff regulations, such as teacher certification; funding; and accountability with respect to charter duration, revocation, student assessment, and charter renewal. Id. In the four laws reviewed in this publication, all required the schools to meet applicable state and local civil rights requirements. See also Blakemore, supra note 17, at 3; Huffman, supra note 23, at 1296 (discussing in part Congressional testimony by Cornelia M. Blanchett before Subcomm. on Early Childhood, Youth, and Families, Sept. 16, 1997, available at 1997 WL 14150775 (detailing differences in oversight): In some states, charter schools are largely deregulated: They are free to decide their own curricula and admissions policies; to hire, fire, and pay teachers by their own standards; and to spend money as they determine. Other states have placed limitations on charter schools, requiring observation of local collective bargaining agreements with extensive local and state oversight. Id. at 1296.


41. See, e.g., Ga. Code Ann. § 20-2-2066(b) (2000) ("A charter school shall not discriminate on any basis that would be illegal if used by a school system"); 105 Ill. Comp. Stat. 5/27A-2(b)(2) (West 2000) (declaring that the General Assembly finds the Article is enacted "to increase learning opportunities...in a manner that does not discriminate on the basis of...gender...").

42. See Miss. Code Ann. § 37-28-9 (2001) (establishing charter schools). § 37-11.3 states: [A]ny...board of trustees is hereby vested with the authority to provide by assignment or reassignment, or other appropriate means, for the separation of students according to sex, separately by classrooms or schools, when such board, in its discretion, determines such separation will promote or preserve the public peace, order or tranquility of the school district, or the health, morals or education of the students.

Id.

43. See, e.g., Colo. Rev. Stat. § 22-30.5-104 (3) (2000) ("A charter school shall be subject to all federal and state laws and constitutional provisions prohibiting discrimination on the basis of...gender..."); La. Rev. Stat. Ann. § 17:3996(C) (2001) ("A charter school...shall comply with state and federal laws and regulations otherwise applicable to public schools with respect to civil rights...").
The U.S. Department of Education Office for Civil Rights (OCR) says charter schools may qualify admissions through selection procedures.\textsuperscript{44} Under some circumstances, Title IX permits single-sex public education.\textsuperscript{45}

An amendment to the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act,\textsuperscript{46} Fiscal Year 2001, provided for funding for same gender schools.\textsuperscript{47} According to the amendment's sponsor, Senator Kay Bailey Hutchison (R-Texas) "[t]he Senate's unanimous support for the Hutchison amendment sends an unmistakable signal to the Department of Education that it is time to create new options in public education."\textsuperscript{48}

The legislative history shows that Congress intended to provide for single-sex educational programs that comply with the Supreme Court's jurisprudence.\textsuperscript{49}

OCR's allowance of qualified admissions into charter schools and iteration of Title IX's exemption for single gender schools, and the enactment of the Hutchison amendment seem to indicate some public support for allowing or encouraging single-sex public schools, so long as the establishment of single-sex schools adheres to applicable law.

\begin{itemize}
\item \textsuperscript{44} U.S. DEPT. OF EDUC., APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS, supra note 10.
\item \textsuperscript{45} See id.
\item \textsuperscript{46} H.R. 4577, 106th Cong. (2000).
\item \textsuperscript{47} Id. (engrossed Senate Amendment 3619). The amendment states "[t]hat funds made under this heading to carry out section 6301(b) of the Elementary and Secondary Education Act of 1965 shall be available for education reform projects that provide same gender schools and classrooms, consistent with applicable law." The amendment was approved by a 99-0 vote in the Senate. \textit{Bill Summary & Status for the 106th Congress, available at} \url{http://thomas.loc.gov} (last visited May 3, 2001). The amended bill, H.R. 4577, was enacted as Consolidated Appropriations Act — Fiscal Year 2001. The amendment was incorporated into the law under Title III - Department of Education, School Improvement Programs. The amendment stated, "Provided further that funds made available under this heading to carry out section 6301(b) of the Elementary and Secondary Education Act of 1965 shall be available for education reform projects that provide same gender schools and classrooms, consistent with applicable law." \textit{Consolidated Appropriations Act — Fiscal Year 2001,} Pub. L. No. 106-554, 114 Stat. 2763A-33.
\item \textsuperscript{48} Press Release, Senator Kay Bailey Hutchison, Senate Adds Senator Hutchison's Single Sex Education Amendment (June 30, 2000), \textit{available at} \url{http://www.senate.gov/~hutchison/pr1256.htm} (last visited Dec. 14, 2000).
\item \textsuperscript{49} The Committee report stated:
\begin{quote}
The conferees support the use of funds appropriated under section 6301(b) to provide single-sex school or classroom programs provided that the recipient "complies with applicable law," a phrase intended to incorporate all relevant Supreme Court opinions, including \textit{U.S. v. Virginia}, 116 S. Ct. 2264 (1996), as proposed by the Senate. The House bill contained no similar provision. The conferees intend that this provision does not require local educational agencies to use Title VI funds only for gender equity activities.
\end{quote}
SINGLE SEX EDUCATION

The effectiveness of single-sex education has emerged as a contentious issue in recent years, particularly after publication of various studies that describe difficulties adolescent girls face in education. Proponents of single-sex education point to studies that indicate girls and boys learn differently. "As the theory goes, boys at this age tend to outshine girls in math and science, while girls outperform boys in reading. Separating them, educators say, cuts down on hormone-driven distractions with the opposite sex and allows teachers to focus better on each group's deficiencies." Furthermore, proponents argue that "[g]irls in single-sex schools have higher self-esteem, are more interested in nontraditional subjects such as science and math, and are less likely to stereotype jobs and careers." 

A development became apparent, however, in more recent studies that control for variables that could influence student performance such as socioeconomic status, prior academic achievement, and career aspirations and educational goals held before commencing single-sex schooling. Earlier studies that did not take into account other variables had a tendency to conclude that single-sex education for girls correlated with positive achievement results. Later studies, Levit asserts, "are more likely to find that the effects of institutional gender type are insignificant and to show other variables... matter much more to student satisfaction." 

Detractors also argue that by separating girls, single-sex education reinforces gender stereotypes of femininity and discourages...
academic competition with males. Those who are drawing upon studies must also consider the larger sociological context of gender bias and the historical inequities women have experienced in education. The research into the performance of girls in mixed educational environments versus sexually segregated environments is not conclusive, producing mostly equivocal results.

STATE ACTOR OR NOT?

The first step in analyzing whether a charter school is violating constitutional mandates of the Equal Protection clause is to decide if it is a state actor; challenges against a private actor cannot stand. The U.S. Supreme Court requires actions be taken under state authority to be considered a violation of constitutional rights.

The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to laws of the state for redress.

In determining if an entity is a state actor, the Supreme Court uses several factors to find state action. An activity "may be state

57. See, e.g., Kaminer, supra note 8 (criticizing all-female schools as promoting contradictory goals).
58. See Levit, supra note 5, at 511-17.
59. Id. at 500-06 (citing studies by Professor Valerie Lee at the University of Michigan challenging notions that girls' schools are not sexist, and finding no pattern of results favoring either single-sex or coeducational schools). Levit argues that single-sex education study results are often misconstrued and misused by those who wish to advocate for single-sex education. Id. at 508-11. See also Diane S. Pollard, The Contexts of Single-Sex Classes, in SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 81 (Am. Ass’n of Univ. Women Educ. Found., 1998) (stating that conclusions cannot be drawn about the impact of single-sex classes).
60. The Civil Rights Cases, 109 U.S. 3, 17 (1883); see also Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (discussing rationale behind state action requirement).
61. Id.
action when it results from the State's exercise of 'coercive power,' when the State provides 'significant encouragement, either overt or covert,' when a private actor operates as a 'willful participant in joint activity with the State or its agents,' controlled by an 'agency of the State,' has been delegated a public function by the State, or when the private entity 'is entwined with governmental policies' or when government is 'entwined in [its] management or control.'

Another way of labeling tests is identifying them as the close nexus test, the government/state compulsion test, or the public/government function test.

In determining if a charter school is a state actor, courts look to the existence of legislative enactments, the charter and the role of the state in regulating the school, the receipt of public funds, the use of publicly owned property, and the degree to which education is a traditional state-supplied function.

An argument can be made that the degree of autonomy the state gives charter school operators through its statute, in granting the charter, and in allowing private entities to operate the school with minimal interference, would lead to a finding that there is not a close enough nexus, or governmental coercion, to lead to a finding of state action. Charter schools, however, receive public funding and may — in some instances — contract with public entities to provide


63. Id. (citing Blum, 457 U.S. at 1004).

64. Id. (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 941 (1982)).

65. Id. (citing Pennsylvania v. Bd. of Dirs. of City Trusts of Phila., 353 U.S. 230, 231 (1957)).


67. Id. (citing Evans v. Newton, 382 U.S. 296, 299, 301 (1966)).

68. Jason Lance Wren, Note, Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools, 19 REV. LITIG. 135, 152-54 (2000). The close nexus test was expanded in Blum, which required such a close nexus between the State and the action that the action may be treated as that of the State, or, stated differently, the entity performs actions that are "normally within the exclusive control of the state." Id. at 152-53. The government compulsion test requires that the state exercise coercion or either overt or covert encouragement, as stated in Blum. Id. at 153. The public/government function test asks if the function performed by the private entity is one that is usually the "exclusive prerogative of the State." Id. at 154 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).

69. Id. at 160-65.

70. Id.
services. This "creates a public quality that will weigh heavily in a court's state action determination."\textsuperscript{71}

In the only case determining whether a privately owned and operated school that received substantial public funding was a state actor, the Court held a school's actions not to be under state imprimatur.\textsuperscript{72} The Court in \textit{Brentwood} characterized the state's role in \textit{Rendell-Baker} as "mere public buyers of contract services, whose payments for services rendered do not convert the service providers into public actors."\textsuperscript{73} Receipt of public funding is but one aspect of the analysis. Charter schools must be accountable to the state in budgeting, adherence to state laws from which they received no waiver, and student performance.\textsuperscript{74} Legislation, school charters, and charter school advocates emphasize that the schools are an autonomous entity within a public scheme. Like the Athletic Association in \textit{Brentwood Academy}, charter schools are "intertwined" with public officials and public requirements. The schools are ultimately accountable to the state for use of funds, adherence to standards, and compliance with terms of their charters. This accountability likely supports a finding that charter schools are state actors.

\textbf{TREATMENT OF SINGLE SEX-EDUCATION IN THE COURTS}

Discrimination based upon gender was brought under the Equal Protection Clause of the Fourteenth Amendment in \textit{Reed v. Reed}.\textsuperscript{75} The Court has required application of intermediate scrutiny to classifications based upon sex.\textsuperscript{76} The two leading cases on single-sex education, \textit{Mississippi University for Women v. Hogan}\textsuperscript{77} and \textit{United States v. Virginia (VMI)},\textsuperscript{78} addressed single-sex education in a higher education context.

In \textit{Hogan}, the Court struck down the single-sex admissions standard that denied Joe Hogan admission to a nursing baccalaureate program at Mississippi University for Women, a policy which Hogan challenged on Equal Protection grounds.\textsuperscript{79} The State argued that the

\textsuperscript{71} \textit{Id.} at 163.
\textsuperscript{72} \textit{Id.} (citing \textit{Rendell-Baker v. Cohn}, 457 U.S. 830 (1982)).
\textsuperscript{73} \textit{Brentwood}, 531 U.S. 288, at 299 (2001).
\textsuperscript{74} See \textit{STATE LEGISLATIVE UPDATE}, supra note 19.
\textsuperscript{75} 404 U.S. 71, 75 (1971) (finding statute favoring men over women as estate executors unconstitutional).
\textsuperscript{76} \textit{E.g.}, \textit{Craig v. Boren}, 429 U.S. 190 (1976).
\textsuperscript{77} 458 U.S. 718 (1982).
\textsuperscript{78} 518 U.S. 515 (1996).
\textsuperscript{79} 458 U.S. at 733.
policy was justified as compensating for discrimination. The Court rejected this argument, based upon facts showing that women earn a substantial majority of baccalaureate nursing degrees in the state and nationwide, and that they comprise a near-absolute majority of employed registered nurses. The policy perpetuated the stereotypical view of nursing as a female job.

The Court stated, "[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." It qualified the standard by reiterating, "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."

The analysis must not be colored by stereotypes about the genders, and a policy presuming inferiority or weaknesses of a gender will be struck down. The test "must be applied free of fixed notions concerning the roles and abilities of males and females.... [I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."

Not only did the State fail to demonstrate a compensatory effect benefiting women, but it also could not show its single-sex policy was "substantially and directly related to its proposed compensatory objective."

In VMI, the Court invalidated Virginia Military Institute’s male-only admissions policy and the state’s attempt to create a comparable program for women, Virginia Women’s Institute for Leadership. Rejecting Virginia’s arguments that the military college’s “adversarial system” of education would be detrimentally altered, and the single-gender admissions policy furthers the purpose of providing diversity in education, the Court was unable to find the “exceedingly persuasive justification” required by precedents.

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80. Id. at 727.
81. Id. at 729.
82. Id.
83. Id. at 728 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975)).
84. Id. (quoting Weinberger v. Wisenfeld, 420 U.S. 636 (1975)) (invalidating statute in which only widows, not widowers, could collect survivors’ benefits under the Social Security Act).
86. Id. (citing Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion)).
87. Id. at 730.
89. Id. at 556. The Court stated, "[f]ocusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’ The burden of justification is demanding
While Justice Ginsburg, writing for the majority, acknowledged inherent differences between men and women are to be "celebrated," the majority opinion emphasizes that these differences may not be applied in a stereotypical manner to exclude members of the opposite sex.  

Compensatory measures that recognize such differences may be acceptable, and have been upheld in a number of cases that distinguish women from men in various state actions. The Court stated that it was addressing "specifically and only" a type of education described in lower courts as "unique," and was not addressing Virginia's "prerogative evenhandedly to support diverse educational opportunities."

The state attempted to establish a comparable program after the U.S. Court of Appeals for the Fourth Circuit remanded the case with remediation requiring admission of women to VMI, the creation of a comparable program, or abandonment of state support, if remediation was not performed. Electing to establish a comparable program, the state created the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a program with a ceremonial corps of cadets and a "cooperative" form of learning rather than the military, adversarial, barracks atmosphere of VMI. The Court found that VWIL was not comparable to VMI. Mary Baldwin College had lower average Scholastic Aptitude Test scores than VMI, fewer faculty with doctoral degrees, fewer curricular choices, inferior athletic and physical education facilities, a smaller endowment, and none of the advantages of entering the renowned VMI alumni network. Such a program was not equal, and "[w]omen seeking and fit for a VMI-

and it rests entirely on the State." Id. at 533 (citation omitted).

90. The opinion stated:
"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.... The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 533.

91. "Sex classifications may be used to compensate women for 'particular economic disabilities they have suffered' to promote equal employment opportunity, [or] 'to advance full development of the talent and capacities of our Nation's people.'" Id. (citations omitted).

92. 518 U.S. at 534 n.7.
93. Id. at 525-26.
94. Id. at 526-27.
95. Id. at 551.
96. Id. at 551-53.
quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection.\textsuperscript{97}

The Court did not explicitly rule out the concept of “separate but equal\textsuperscript{98}” schools segregated by gender. Indeed, by addressing the VMI policy as a “unique” educational opportunity, the Court seems to have left the door open to state-funded single-sex education that features comparable programs.

Two earlier lower court cases allowed single-sex education, although both were decided a considerable time before \textit{Hogan} and \textit{VMI}.\textsuperscript{99} In \textit{Williams v. McNair}, a group of male plaintiffs challenged the women-only admissions policy at Winthrop College on Equal Protection grounds, and lost.\textsuperscript{100} The district court relied upon the Code of South Carolina, which created Winthrop as a women’s college.\textsuperscript{101} Addressing the Equal Protection Clause, the court stated “a legislative classification based on sex, has often been held to be constitutionally permissible.”\textsuperscript{102} The plaintiffs were free to choose from numerous state colleges, showed no evidence of special courses or programs at Winthrop that would make Winthrop more appealing or beneficial than other colleges, and, in the case of a few of the group, showed that only geographic convenience could be gained by attending Winthrop.\textsuperscript{103}

In holding Winthrop’s policy did not violate the Equal Protection Clause, the court wrote, “[w]hile history and tradition alone may not support discrimination, the Constitution does not require that a classification ‘keep abreast of the latest’ in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason.”\textsuperscript{104}

The outcome in \textit{Williams} would be different today, after Supreme Court decisions in the past thirty years, such as \textit{Hogan} and \textit{VMI}. The court in \textit{Williams} held that it would not declare “a legislative classification, premised as it is on respectable pedagogical opinion, is without any rational justification and violative of the Equal Protection Clause.”\textsuperscript{105} Such a rational review is much less rigorous

\textsuperscript{97} Id. at 557.
\textsuperscript{101} Id. at 136 (citing S.C. Code § 401 (1962)).
\textsuperscript{102} Id. at 137 (citations omitted).
\textsuperscript{103} Id. at 138.
\textsuperscript{104} Id. at 137 (citing \textit{Levy v. Louisiana}, 391 U.S. 68, 71 (1968); \textit{Goesart v. Cleary}, 335 U.S. 464 (1948)).
than the intermediate level of scrutiny applied in Craig v. Boren\textsuperscript{106} and subsequent gender discrimination cases decided by the Supreme Court.\textsuperscript{107}

In the other pre-Hogan lower court decision allowing single-sex education, the United States Court of Appeals for the Third Circuit held single-sex admissions regulations at Philadelphia Central and Girls High Schools did not violate the Equal Protection Clause.\textsuperscript{108} A girl applied to the prestigious, all-male Central High School in Philadelphia, but was refused admission, as another prestigious all-female school, Girls' High, existed.\textsuperscript{109} She filed a class action suit seeking relief under 42 U.S.C. § 1983 from alleged unconstitutional discrimination, and the district court granted an injunction, ordering that female students be admitted to Central High School.\textsuperscript{110}

The Third Circuit looked to Congressional legislation to attempt to resolve the issue of whether “the deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige” was discriminatory.\textsuperscript{111} It looked at Title IX,\textsuperscript{112} the Elementary and Secondary Education Act of 1965,\textsuperscript{113} and the legislative history of both.\textsuperscript{114} The court concluded the legislation was “so equivocal that it cannot control the issue in this case.”\textsuperscript{115} It found in legislative history “no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives. That drastic step should require clear and unequivocal expression.”\textsuperscript{116}

\textsuperscript{106} 429 U.S. 190 (1976).
\textsuperscript{109} Id. at 881; \textit{see also} id. at 887 (“[F]actual findings establish that, for many years past and at the present, excellent educational facilities have been and are available to both sexes.”). Additionally, attendance at the two single-sex schools was voluntary. Id. at 886 (“Moreover, enrollment at the single-sex schools is applicable only to high schools and is voluntary, not mandatory.”).
\textsuperscript{110} Id. at 881.
\textsuperscript{111} Id. at 882-83.
\textsuperscript{112} 20 U.S.C. § 1681.
\textsuperscript{113} 20 U.S.C. §§ 2701-2721.
\textsuperscript{114} Vorchmeier, 532 F. 2d at 883.
\textsuperscript{115} Id. at 885.
\textsuperscript{116} Id. The court concluded that the “ambiguous wording” of the Equal Educational Opportunities Act demonstrated that Congress “deliberately chose not to act and to leave open
Unable to find a definitive answer in statutory authority, the court turned to case law dealing with sex discrimination, and found strong applicability of Williams v. McNair, which at the time was the sole U.S. Supreme Court decision on gender classification in school admissions. Though Reed v. Reed mandated the "substantial relationship" test shortly after Williams was decided, the appellate court in Vorchmeier held that Williams, despite using a "rational relationship" test, was applicable because the facts were similar to the case at bar, albeit with a different gender of plaintiff. Additionally, the "schools' restrictive admissions policy applied to both sexes, a significant difference from the preferential statutory procedure in Reed."

The court recognized that "there are differences between the sexes which may, in limited circumstances, justify disparity in law." The court found no compensatory justification for the admissions policies, there being "no evidence of past deprivation of educational opportunities for women in the Philadelphia School District." The evidence in the record, however, led the court to hold "that a legitimate educational policy may be served by utilizing single-sex high schools." The court did not decide whether to apply a rational or substantial relationship test, as it stressed the outcome would be the same under either. In dicta, the majority asserted the cost of

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117. Id. at 887.
118. 404 U.S. 71 (1971).
119. See id. (using a "substantial relationship" test in holding unconstitutional a statute disallowing female estate administrators if a male qualified for the appointment).
120. Vorchmeier, 532 F.2d at 887.
121. Id. The court addressed the similar effects of the admissions policy on both sexes, stating, "[t]he plaintiff has difficulty in establishing discrimination in the school board's policy. If there are benefits or detriments inherent in the system, they fall on both sexes in equal measure." Id. at 886.
122. Id. The court stated that disparity is sometimes more "favorably considered when it confers on the female some benefit tending to rectify the effects of past discrimination." Id. at 887.
123. Id.
124. Id. at 887-88. The court further explained:

The primary aim of any school system must be to furnish an education of as high a quality as feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship.

Id. at 888.
125. Id.
abolishing single-sex schools would be too great, stifling the school board from providing alternatives.\textsuperscript{126}

After \textit{Hogan} was decided, the Court of Common Pleas of Philadelphia County found sex segregation could not be justified and exclusion of girls from Central High violated the Equal Protection Clause.\textsuperscript{127}

The only case decided since \textit{Hogan} involving the challenge of a single-sex admissions policy in an elementary or secondary school is \textit{Garrett v. Board of Education of Detroit}.\textsuperscript{128} The facts in \textit{Garrett} are similar to challenges brought against a single-sex charter school, such as the Chicago Young Women's Leadership Academy.\textsuperscript{129} The Detroit school system planned to open three male academies, enrolling boys from preschool through fifth grade, and not offering any comparable academy for girls at that time.\textsuperscript{130} The male academies were aimed at at-risk boys in urban environments, and included special course offerings such as an Afro-centric curriculum, mentoring, Saturday classes,\textsuperscript{131} and a “Rites of Passage” class emphasizing goal-setting, responsibility, and mastery of emotions as important values for men.\textsuperscript{132} The plaintiffs were female children and their parents, and sought a preliminary injunction preventing the school board from opening the academies.\textsuperscript{133}

Though the defendant argued that “coeducational programs aimed at improving male performance have failed[,]”\textsuperscript{134} the court found that the evidence did not show that exclusion of females from the academies would combat the failures and obstacles urban males encounter, nor that the inclusion of females in schools is the reason

\textsuperscript{126} \textit{Id.}

\textit{Id.} If she were to prevail, then all public single-sex schools would have to be abolished. The absence of these schools would stifle the ability of the local school board to continue with a respected educational methodology. It follows too that those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice. The existence of private school is no more an answer to those people than it is to the plaintiff.

\textit{Id.}


\textsuperscript{129} \textit{See id.} at 1006.

\textsuperscript{130} \textit{Id.} at 1006-07. “The Board hints that an academy for girls is in the works.” \textit{Id.} at 1013.

\textsuperscript{131} \textit{Id.} at 1006.

\textsuperscript{132} \textit{Id.} at 1007.

\textsuperscript{133} \textit{Id.} at 1005.

\textsuperscript{134} \textit{Garrett}, 775 F. Supp. at 1007.
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schools are failing urban males. The statistics presented by the school board, such as high homicide, unemployment, and educational drop-out rates among African-American males, did not demonstrate "that excluding girls is substantially related to the achievement of the Board's objectives." Thus, the program would not satisfy the requirement of Hogan that the gender classification serve "important governmental objectives and that discriminatory means employed" are "substantially related to the achievement of those objectives."

The court, as the appellate court had done in Vorchmeier, looked to statutory authority to control the decision, but unlike Vorchmeier, found that Title IX would not allow such a single-sex program. The court looked at the Equal Educational Opportunities Act (EEOA) as well, finding that the only decision considering gender segregation under the EEOA was easily distinguishable and could not support the plaintiffs' claim. The court did not consider whether the program could qualify as an affirmative action program, for the school board admitted that the academies were not such a program. Though the court acknowledged the purpose of the academies was important and that urban males were at risk, it held this purpose was insufficient to overcome the statutory and constitutional authority prohibiting establishment of sex-segregated educational opportunities, and granted the injunction.

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135. Id. at 1008. The court pointed out "the educational system is also failing females." Id.
136. Id. at 1007.
137. Id. at 1008 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).
138. Garrett, 775 F. Supp. at 1008-09. The court held that Title IX's exclusion of public elementary and secondary schools applied to "historically pre-existing single sex schools." Id. at 1009. The school board argued that the academies remedied the "limited participation of urban males in educational programs and activities," as allowed by 24 C.F.R. § 106.3(b) ("In the absence of finding of discrimination [by the Assistant Secretary of Education] on the basis of sex...recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."). Id. at 1009. The court, however, deferred to the opinion of OCR that "all male public elementary and secondary school programs violate Title IX." Id.
140. Garrett, 775 F. Supp. at 1010. The case, United States v. Hinds County School Board, concerned a school district that consisted of only four sex-segregated schools to which students were assigned permanently. Id. (citing United States v. Hinds Co. Sch. Bd., 560 F.2d 619 (5th Cir. 1977)). The Detroit School Board considered its academies experimental, on a three-year plan, and voluntary for students to attend rather than mandated by assignment. Id. The court also considered Michigan statutes and concluded that the plaintiffs would be likely to succeed with their claim under Michigan educational legislation. Id.
141. Id. at 1011.
142. Id. at 1014.
CONCLUSION

Single-sex charter schools are an innovative way to address concerns educators and the public have about the performance of students in elementary and secondary grades. The gender based admissions policies may be challenged, however, as violative of the Equal Protection Clause. Though much of the case law regarding single-sex education would seem to foreclose the operation of this type of school, such a decision is not automatic.

Under a challenge, a school may attempt to defend itself as not being a state actor. Though the schools have a great deal of autonomy, and case law such as Rendell-Baker has shown that state funding alone does not impute the status of state actor to an entity, the charter school will be found a state actor. Closely resembling this is Brentwood Academy, 143 in which athletic organizations that did not allocate state funding but did supervise public schools were found to be “intertwined” enough to be state actors.

An Equal Protection challenge will assert that the school’s stated purpose of having a single-sex environment incorporates overbroad generalizations and stereotypes about the sexes in its establishment. This is the danger that, for example, all-girls’ schools may face in producing evidence of girls’ inferior performance in co-educational classrooms or in mathematics and science classes. Detractors will present their own evidence showing that studies documenting inferior performance of children in coeducational classes are inconclusive, and that gender stereotypes may be reinforced by such segregated environments.

To withstand such a challenge, a school’s best course of action lies in proving several points. First, a school may attempt to show a compensatory purpose that affords a gender an opportunity that past discrimination has denied them. This relies on studies and statistical evidence that children in co-educational classrooms have been denied an opportunity to reach their potential, such as research that girls fare worse in science classes in which they compete with boys. Giving girls their own class, the argument goes, compensates for the discrimination they have experienced in co-ed classes.

The existing U.S. Supreme Court decisions regarding single-sex education focus on equality in a higher education environment. Indeed, the majority in VMI emphasized that the decision concerned a “unique” educational opportunity. Distinguishing these higher-education decisions of the Supreme Court from the facts of an

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elementary or secondary school case may be a necessary tactic to defending the vitality of a single-sex charter school.

Current legislative and regulatory action, or — in the case of the ACLU’s complaint to OCR about the Young Women’s Leadership School of Harlem — inaction, may call for judicial deference to changing notions about the acceptability of alternative forms of schooling. The inclusion of a provision allowing funding for single-sex schools and classrooms in the Fiscal Year 2001 Appropriations Act indicates Congressional intent to allow experimentation with single-sex schools. OCR had yet to issue an opinion regarding the Harlem girls’ school as of 2001, a lack of action that would seem to condone such a program.

Perhaps the safest way to ensure that a girls’ charter school survives judicial scrutiny is to create a comparable all-boys charter school or demonstrate that an all-boys public school of similar quality is available to males desiring such an education. A critical aspect of the VMI decision was the dissimilarity of the female-only program, VWIL, which the Commonwealth attempted to establish to equate to the male-only program at VMI. The existence of all-female Girls’ High in Philadelphia was a factor in Vorchmeier, in which the Central High’s male-only admissions policy and Girls’ High’s female-only policy affected the sexes equally.

No decided case since Scalia’s dire VMI prediction has challenged the notion of single-sex education in primary and secondary schools. Though opponents of such schools have voiced their dissatisfaction, arguing that single gender schools foster unequal treatment of the sexes, the schools are still open. In the event that schools are challenged, if proponents can present sufficient, current evidence of positive effects of single-sex education on performance, and establish or show evidence of comparable programs for the opposite sex, they will possibly slip through the crack in the crystal ball and survive.

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